STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2002B076

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

NESTOR LUJAN,

Complainant,

vs.

DEPARTMENT OF REVENUE,
MOTOR VEHICLE BUSINESS GROUP,

Respondent.

Administrative Law Judge Robert W. Thompson, Jr. heard this matter on June 24-25, 2002. Joseph Q. Lynch, Assistant Attorney General, represented respondent. Complainant appeared in-person and was represented by Mark A. Schwane, Attorney at Law.

MATTER APPEALED

Complainant appeals his disciplinary reduction in pay. For the reasons set forth below, the disciplinary action is rescinded.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;

2. Whether the discipline imposed was within the range of available alternatives;

3. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

The Administrative Law Judge has considered the exhibits and the testimony, assessed the credibility of the witnesses and makes the following findings of fact, which were established by a preponderance of the evidence.

1. Nestor Lujan, complainant, has been employed by the Department of Revenue (DOR), Driver's License Section, for close to twenty years. He began as a Driver's License Examiner, was promoted to Regional Manager in Colorado Springs in 1990, and transferred back to Denver in November 1998 to become Leasing Manager (General Professional (GP) IV). He has a good work record of long standing.

2. Complainant's office is located at 1805 West Mississippi Avenue in Denver. He receives and picks up some of his mail at 1881 Pierce Street in Lakewood.

3. Complainant's duties include negotiating leases. As a GP IV, he is expected to, and does, maintain a high level of expertise in his field. He also performs such tasks as processing requests for telecommunications.

4. When complainant began as Leasing Manager, Jeanne Barrish was the contract administrator, to whom complainant was able to direct questions during his learning phase. Barrish informed him that she, not he, was the one who would contact the Attorney General's Office if the need arose. The procedure was that the contract administrator would make the contact.

5. Donald L. Burton, now retired, worked for the Department of Revenue (DOR) for fourteen years. Burton was Operations Manager for the Driver's License Section and complainant's appointing authority at all pertinent times herein.

6. Edward Tyler, a contracted leasing agent for the state, was primarily in charge of negotiating a renewal of the lease for the Department of Motor Vehicles Colorado Springs Regional Service Center (CSRSC) at the Shops at the Bluffs shopping center in Colorado Springs. The term of the lease was December 1, 1991, through November 30, 2001.

7. It is standard policy for a holdover clause to appear in state leasing agreements so that state agencies can stay beyond the term of the lease if necessary. As a safety net for the state, a provision calling for an increase in rent to 125% if the agency stayed longer than the lease term was included in the CSRSC lease.

8. The primary negotiator for the lessor was Mark Dunn of American Capital Group, LLC (American Capital). It was clear to Dunn that Tyler was in charge of these lease negotiations for the state. Complainant told him that Tyler was in charge. Over a period of five or six months, Dunn made telephone calls to complainant because he felt that Tyler was not forthcoming with necessary information, mainly as to when the state would make a decision. Prior to writing a letter on September 7, and again later in September, Dunn talked to Burton about the holdover clause in the lease and said that the lessor would not agree to it. Complainant had told Dunn that they were looking at other property to lease.

9. By letter dated September 7, 2001 to complainant, with a copy to Tyler, Dunn stated his position that a holdover condition would not be

possible, and the Department of Revenue would have to surrender the property on November 30.

10. As DOR Director of Purchasing & Contracts, Sharon Meyer oversees all DOR contracts and leases. Complainant provided her with a copy of the September 7 letter and subsequent correspondence from Dunn regarding the subject lease. Complainant kept Meyer informed of the goings-on through fax, e-mail, and personal contact. She would then talk to Don Burton.

11. Barbara DeHart, Manager of Administrative Operations for the Driver's License Section, now retired, was complainant's immediate supervisor beginning in December 1998. During this lease negotiation period, complainant kept DeHart informed via telephone calls and meetings. He related virtually everything to her, and she then related their options to Burton, who was her direct supervisor. DeHart was satisfied that complainant was talking to everybody necessary and keeping everybody informed.

12. Complainant and Tyler kept in touch with each other. They believed that the lessor would eventually agree to a short-term extension of the lease because the lease provided for an increase in rent to 125% on a month-to-month basis, and the lessor had no other prospective tenant for the space. DeHart, Meyer, and Burton all came to adopt this view. Burton also was not concerned because a lessor had never refused to agree to a temporary holdover before.

13. By letter dated September 27, 2001, based upon having received information from Don Burton that the lessee would be relocating to another facility, Mark Dunn advised complainant that the lessor would not agree to a holdover and would initiate an action in forcible entry

and detainer, if necessary, to obtain possession of the leased premises.

14. Complainant faxed copies of the September 27 letter to Tyler, DeHart, Meyer, and Burton. He talked to Tyler on the phone and asked for his recommendation, but Tyler said he wanted to talk to his attorney about it first.

15. Tyler got back to complainant on October 2 or 3. He was quite certain that an extension of the lease would be granted at 125% of the current rate, that is, the rent would be increased from $7,700 per month to $9,600 per month. It seemed to make good business sense; the lessor did not have anyone else ready to move into the space. Complainant immediately telephoned DeHart and Burton, and they decided to pursue an extension. Complainant asked Tyler to draft a lease extension for signature.

16. On October 12, 2001, a week after complainant had talked to both DeHart and Burton, Assistant Attorney General Larry Williams called complainant and left a message to return the call, which complainant did the same day. The Attorney General's Office had received an October 5 letter from the attorney for American Capital threatening to bring an action for forcible entry and detainer if the premises at the Shops at the Bluffs was not vacated by the expiration of the lease, November 30, 2001. (Complainant also received this letter and faxed it to Tyler, DeHart, Meyer and Burton.) Williams wanted to know what the Department would be doing. Complainant discussed the matter with him and stated that the decision had been made to pursue an extension. Williams did not offer any words of advice or insight.

17. On October 26, 2001, an eleven-year lease was entered into with Diamante Market Centre, LLC (Diamante), to provide space for the DOR Colorado Springs Regional Service Center, which was to be ready for occupancy around mid-January 2002. This was a better deal for the state than the previous lease had been. Among other things, Diamante agreed to cover the cost of janitorial services. Overall, the state stood to save more than $400,000 over the term of the lease.

18. Also on October 26, a meeting was called by Gayle Duncan of the contract office primarily to discuss the budget. In attendance were Duncan, Burton, DeHart, complainant, budget analysts Julie Featherstone and Larry Harold, and perhaps one other person. Complainant told them that Tyler, who was in the process of negotiating a three-month extension, was positive that an extension would be granted. He also informed them that he had talked to Assistant Attorney General Larry Williams a couple of weeks earlier and had apprised Williams of the situation. All attendees agreed to count on an extension of the current lease until the new property was ready for occupancy. They did not discuss the possibility of having to vacate the current premises earlier than they wanted to because they did not believe that they would have to do that. This became the plan.

19. The state signature process was shortened in order to facilitate a lease extension, so Tyler was able to advise American Capital that all they had to do was sign a three-month extension agreement and they would receive their money.

20. Complainant does not have the authority to sign leases on behalf of the state.

21. By letter dated November 14, 2001, American Capital's attorney responded to a November 9 letter to Mark Dunn from Tyler, reiterating that the lease would not be extended and the premises must be turned over by Friday, November 30. Complainant also received this letter and faxed it to DeHart, Meyer, and Burton. De Hart and Meyer had several conversations about it, but the plan still was that they were staying.

22. Complainant was out of the office for Thanksgiving Day and the Friday and Monday following. He returned to the office on Tuesday, November 27 when, between 7:15 a.m. and 7:30 a.m., he received a telephone call from Burton advising him that the decision had been changed and they had to move by November 30.

23. Complainant telephoned DeHart immediately to let her know that everybody had to get ready to move. He contacted Tyler, who succeeded in obtaining temporary space on an emergency basis from Diamante because of the long-tern lease having already been signed. He made special arrangements with the Department of Corrections to have movers available by Friday, overcoming the normally required two-weeks notice. He worked on telecommunications changes; everyone would be able to keep the same telephone number. He helped coordinate the move of offices.

24. Complainant was in Colorado Springs on Friday, the day of the move, and assisted in transporting desks and boxes. The move was completed sometime after 5:00 p.m., but before midnight. The temporary office was open for business on Monday, December 3. Some employees, whose job did not require public contact, were allowed to work at home, although they all probably could have squeezed into the new space if necessary.

25. On December 3, 2001, Don Burton, the appointing authority, gave notice to complainant of a Rule R-6-10 meeting for the purpose of discussing "the recent situation at the Colorado Springs Driver License Office."

26. The predisciplinary meeting was held on December 17, 2001. On January 4, 2002, Burton issued a disciplinary action of a ten percent, three-month pay reduction to complainant for failure to perform competently, based on Burton's four factual conclusions: a) "Poor judgment on your part by not notifying your supervisor of the consequences of not relocating the CSRSC by November 30, 2001;" b) "Relying on the word of the Realtor's attorney, who has no contractual obligation to the state, to guide your actions regarding the CSRSC;" c) "Having no alternate location to which to move the CSRSC on or before November 30, 2001;" d) "Not requesting assistance from the Office of Attorney General when it became apparent that the lessor would not accept either the 30-day holdover provision or sign a contract extension." These were the only reasons for the disciplinary action.

27. In drawing his conclusions, Burton did not talk to Barb DeHart, complainant's supervisor. No one told him that complainant did not properly communicate.

28. The conclusion that complainant relied on the word of the Realtor's attorney apparently stems from a December 10, 2001 summary-of-events letter from Tyler to complainant in which Tyler referenced having consulted an attorney and complainant agreeing that this should be the course of action for the state to take. Complainant did

not talk to any attorney other than Larry Williams of the Office of the Attorney General. Burton did not talk to Tyler.

29. No one instructed complainant to request assistance from the Office of the Attorney General. The policy in the past was that contacts with the Attorney General's Office would be made by the contracts administrator. DeHart told complainant to go through the contracts office but in this case he might want to have a conversation on his own, which he did.

30. Complainant was not asked to look for temporary space. He was never directed to find an alternate location other than the long-term lease executed on October 26, until November 27, 2001. By contacting Tyler, complainant obtained sufficient temporary space for the office to be operational on December 3.

31. The appointing authority acknowledges that complainant has a very good work record and "has done a good job at every job he has worked at."

32. DeHart found out about the disciplinary action either when Burton told her about it after the action was taken or when complainant showed the disciplinary action letter to her. She was incensed and disappointed. As complainant's direct supervisor, she felt that his job performance was "most definitely adequate" under the circumstances. She believed that he kept her fully informed all along the way. She was shocked and appalled that complainant received a disciplinary action when he was the "low man on the totem pole" and everybody involved (including Burton) made the decision to stay; it was a group decision. In her opinion, complainant should have gotten a pat on the back for all that he did getting them to a temporary location.

33. No one else was given a corrective or disciplinary action.

34. For the three years she supervised him, DeHart found complainant's job performance outstanding; he was detailed, thorough, and discussed everything.

35. Complainant Nestor Lujan filed a timely appeal of his discipline on January 17, 2002.

DISCUSSION

I.

At the end of respondent's case-in-chief, respondent moved for summary judgment in its favor. The motion was denied on the grounds that material facts were in dispute and respondent was not entitled to judgment as a matter of law.

Complainant then moved for judgment pursuant to CRCP 41(b)(1) on the ground that respondent had not presented sufficient evidence to sustain any of the four factual allegations on which the disciplinary action was based, namely: a) complainant did not notify his supervisor of the consequences of not relocating the CSRSC by November 30, 2001; b) complainant relied on the word of Tyler's attorney, who had no contractual obligation to the state, to guide his actions; c) complainant had no alternate location to which to move the CSRCS on or before November 30, 2001; and d) complainant did not request assistance from the Office of Attorney General when it became apparent that the lessor would not accept either the 30-day holdover provision or sign a contract extension.

Following argument, complainant's motion was granted as to the allegation that complainant did not notify his supervisor, since there was no evidence

whatsoever on this point. The testimony showed only that the appointing authority did not talk to the supervisor in arriving at his conclusion. Respondent did not call the supervisor as a witness.

II.

By the close of all the evidence, respondent had failed to meet its burden to demonstrate by preponderant evidence (more likely than not) that just cause warranted the discipline imposed. *See Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994) (explaining role of state personnel system in employee discipline actions).

The evidence suggests that the appointing authority, for some reason, decided to blame someone for the last-minute move of the CSRSC, and complainant was the obvious choice. How he was able to conclude that complainant did not keep his supervisor informed is anybody's guess. This allegation is a complete fabrication and an act of bad faith. The supervisor's testimony was the exact opposite of the appointing authority's conclusion. Not only was this self-made conclusion groundless, but the other three were as well.

The charge that complainant relied on the word of Tyler's attorney, who had no contractual obligation to the state, is ludicrous. Complainant's conversations were with Tyler, who *did* have a contractual obligation to the state, not with the attorney. Tyler sought information from an attorney and shared it with complainant. Complainant kept everybody with an interest, including the appointing authority, the contract administrator, and his supervisor, apprised of up-to-date information and options. They all participated in the decision to pursue an extension of the lease. Had Tyler never communicated with the private attorney, the decision would have been the same. There is no evidence that it made any difference. There is no evidence that the decision, however based, was a bad decision because the plan to stay was never carried out. The

decision was changed by somebody, necessitating an emergency move. There is no evidence that complainant was precluded from listening to Tyler depending on the source of Tyler's information.

The charge of having no alternate location for the CSRSC on or before November 30 is hard to understand. Complainant does not have signatory power and does not give the final approval of a leasing arrangement. No one instructed or suggested to him that he find an alternate location, other than the long-term lease that was executed on October 26, until November 27 when Burton told him they had to move by November 30 and it became obvious. Complainant then contacted Tyler, and space was found in time (before November 30) based upon the long-term lease having been executed. If complainant did something wrong here, respondent did not reveal it.

The charge of not requesting assistance from the Office of the Attorney General is as frivolous as the others. At no time did anyone tell complainant to contact the Attorney General's Office. There is no evidence of what difference it would have made, no showing that an assistant attorney general possessed helpful advice but did not render it for the reason that complainant did not specifically ask. Historically, it was the job of the contract administrator to contact the Attorney General. Moreover, complainant *did* discuss the situation with Assistant Attorney General Williams on October 12, but no advice was forthcoming.

III.

Complainant did not knowingly or willfully engage in any misconduct. He performed his duties fully, as he was made to understand them. He did not refuse to do anything that was asked of him. Even if the allegations were true, which they were not, they were based on hindsight; they were not self-evident.

The disciplinary action has no basis in fact or law. The appointing authority did not exercise due diligence in obtaining all the necessary evidence and did not candidly consider all of the evidence before him. Respondent's action is based on conclusions from the evidence such that a reasonable person must reach a contrary conclusion. *See Van DeVegt v. Board of County Commissioners of Larimer County*, 55 P.2d 703, 705 (Colo. 1936). *See also Lawley v. Dep't of Higher Education*, 36 P.3d 1239 (Colo. 2001).

IV.

Section 24-50-125.5, C.R.S., provides that an award of attorney fees and costs is *mandatory* if it is found that the personnel action from which the proceeding arose was instituted or defended "frivolously, in bad faith, maliciously or as a means of harassment or was otherwise groundless." This record sustains findings that respondent's action was brought in bad faith and was groundless and frivolous.

When the agency has no grounds for the particular disciplinary action taken, an award of attorney fees is mandated. *Coffey v. Colorado School of Mines*. 870 P.2d 608 (Colo. App. 1993), *cert. denied*. *See Hartley v. Department of Corrections*, 937 P.2d 913 (Colo. App. 1997). *See also* Rule R-8-38, 4 CCR 801.

CONCLUSIONS OF LAW

1. Respondent's action was arbitrary, capricious or contrary to rule or law.

2. The discipline imposed was not within the range of available alternatives.

3. Complainant is entitled to an award of attorney fees and costs.

ORDER

The disciplinary action of a pay reduction is rescinded. Complainant shall be reimbursed lost pay and benefits. Respondent shall pay to complainant the amount of his attorney fees and costs incurred in the pursuit of his appeal.

DATED this ___ day of July, 2002, at Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The

filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is $50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of July, 2002, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Mark A. Schwane
Attorney at Law
Colorado Federation of Public Employees
1580 Logan Street, Suite 310
Denver, CO 80203

And through the interagency mail to:

Joseph Q. Lynch
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

_____